IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-266

JOHN J. TATAR, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

EARL W. KINTNER
BURTON A. SCHWALB
MICHAEL J. VALDER
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Pursuant to Rule 24(5) of the Rules of this Court, petitioner submits this Supplemental Brief in order to call the Court's attention to a landmark recent decision which bears directly on the issues raised in the Petition for a Writ of Certiorari. On September 14, 1971, the United States Court of Appeals for the District of Columbia Circuit, *En Banc,* rendered a decision in *United States* v. *Thomas* (No. 22,768) forbidding con-

tinued use by federal courts in the District of Columbia of the standard *Allen* instruction. The *Thomas* decision is especially significant (1) because it widened the split among the federal circuit courts on the question of whether the traditional *Allen* charge should be used by trial courts, (2) because the Court of Appeals also found that the admonitions given by the trial court were sufficiently coercive to require a reversal of the conviction therein on that ground alone, and (3) because the opinion notes an implied admission by the Government that its traditionally strong and unbending argument in favor of the standard *Allen* charge is being severely eroded by the trend of decisions on this issue.

In *Thomas* the *En Banc* Court of Appeals joined the Courts of Appeals for the Third, Seventh and Tenth Circuits, and the highest courts in several states, in prohibiting the further use of the standard *Allen* charge.[1] The *Thomas* decision not only broadens the conflict among the circuits, but the opinion is also an articulate expression of the need for intervention by appellate courts into the manner in which trial courts handle deadlocked juries. Such intervention is essential to sound administration of justice and to stem the tide of difficult appellate litigation made necessary by the continued use of the traditional *Allen* instruction, and by

[1] The decisions of the United States Courts of Appeals for the Third, Seventh and Tenth Circuits, and the highest courts in the states of Arizona, Montana and Pennsylvania have already been noted and discussed in the Petition, the Government's Opposition, and in petitioner's Reply. In addition, on August 6, 1971, the Supreme Court of Alaska reached a similar decision in *Fields* v. *State*, 9 Crim. L. Rptr. 2473, adding to the number of state courts which have repudiated the use of the standard *Allen* instruction.

the use of "*Allen*-plus" language which trial courts seem unable to avoid.

While four of the eleven circuits have now prohibited continued use of the standard *Allen* charge, it is also apparent that the remaining circuits have continued to follow this Court's seventy-five year old opinion in *Allen* v. *United States,* 164 U.S. 492 (1896), because of the view that any change should come from the Supreme Court rather than from the Courts of Appeals. See, for example, *Hodges* v. *United States,* 408 F.2d 543, 552 (8th Cir. 1969; opinion by Blackmun, Circuit Judge).

In our Petition for a Writ of Certiorari, and in our Reply to the Government's Memorandum in Opposition, both of which were filed before the *Thomas* decision, we noted the split among the circuits on this question, and requested this Court to review this most important matter in the context of this case from the Ninth Circuit. We did so not only because of the need for an exercise by this Court of its general supervisory powers, but also because this case presents a well-developed trial record showing reversibly coercive instructions which went beyond the traditional language of the *Allen* charge. While we are urging this Court to reverse petitioner's conviction because of the compellingly coercive "*Allen*-plus" admonitions on the authority of *Jenkins* v. *United States,* 380 U.S. 445 (1965), and other cases (now including *Thomas*), we are also urging a general supervisory review of this issue by this Court.

The Government will either seek review by this Court of the *Thomas* decision or acquiesce in it. In either event, the position taken by the Government in its

Opposition to the Petition for Certiorari in this case has changed. If the Government should decide to seek review by this Court of the *Thomas* decision, it would be reversing its position in this case—that this issue is not one which the Court should review. Also, if review is sought in *Thomas* and granted, it would be unfair to this petitioner to have his request for review denied only to have the issue decided later in the context of the *Thomas* decision but, because of the timing, affording petitioner no relief.

On the other hand, if the Government does not seek review of the *Thomas* decision, its acquiescence in that decision would constitute a change of position from that expressed in the Government's Opposition herein. In that event, justice would seem to require the same concession to this petitioner that the Government would be making to the appellant in *Thomas*.

It is now unknown whether the Government will seek review by this Court of the *Thomas* decision. However, it should be noted that the Government deemed the issue important enough to request *En Banc* rehearing by the Court of Appeals, and that in arguing the *Thomas* decision the Government evidenced a change in its traditional position of unbending support for the standard *Allen* charge. As described in the *Thomas* decision:

> "At oral argument the Government, anticipating that we might modify our rule, proposed that we not adopt the ABA-approved instruction but instead accept variant wording (footnote omitted). Our initial reaction is that the wording proposed is not a major improvement. Perhaps further study would confirm that initial view. But we are not disposed to open the door to variants in

> language, having in mind that it was through just such a process that the courts were led into the increasing difficulties we outlined earlier in this opinion." Slip Opinion, pp. 21-22.

Although it is not fair to say that the Government made a major concession, the position taken by the Government in oral argument before the Court in *Thomas* is an indication that federal prosecutors are reluctantly acknowledging that the tide is against them on this issue.

Prior to the *Thomas* decision the leading decision in the District of Columbia was *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), *cert. denied* 387 U.S. 934 (1967). In his opinion in *Fulwood*, Judge (now Chief Justice) Burger urged the trial bench to "consistently use a form of instruction plainly within *Allen*." However, the *Thomas* court found that trial courts have not done so; they have continued to use expressions which add extra measures of influence upon juries. After finding that the *Fulwood* admonition to trial courts had not engendered the desired result, the *Thomas* court then stated:

> "We believe that appellate courts should no longer be burdened with the necessities and niceties—and the concomitant uncertainties—of gauging various *Allen*-type renditions in terms of the coerciveness of their impact. We are persuaded, too, by the volume and complexity of litigation generated by the *Allen* charge, that its continued unrestricted use is incompatible with sound judicial administration. We have before us today what was not available when *Fulwood* issued—the standard that was painstakeningly reviewed and approved by the designated committee of the American Bar Association's Project on Minimum Standards for

> Criminal Justice, that was adopted by its House of Delegates, and that was mandated by opinions of the Third and Seventh Circuits. We think the time has come to follow the path they have traveled and lay down the same mandate." Slip Opinion, pp. 17-18.

We urge this Court similarily to lay down the same mandate, and to adopt the American Bar Association's proposal.

The *Thomas* decision is significant not only because it joined three other circuits in prospectively prohibiting the use of the traditional *Allen* charge, but also because the Court of Appeals for the District of Columbia Circuit prefaced that ruling with a finding that the instructions utilized by the trial court were sufficiently coercive to require a reversal on that ground alone. That finding and conclusion is directly relevant to the instant case because the coercion found in the *Thomas* case was even less compelling than the coercion applied against petitioner's jury. The *Thomas* decision found several coercive elements which, in combination, required a reversal (Slip Opinion, pp. 9-13), each of which is present in the instant case; however, of even greater importance is the fact that the *Allen* instruction was given in the main body of instructions to the *Thomas* jury, before deliberations and deadlock. The dissenting opinion in *Thomas* notes that the instruction in those circumstances is inherently less coercive (when given prior to deliberations), and more coercive when used after a jury deadlocks. In the instant case petitioner's jury was "Allenized" after they reached an impasse.

In finding coerciveness requiring a reversal in the *Thomas* case, the Court of Appeals for the District of

Columbia Circuit cited (Slip Opinion, p. 10) and relied upon this Court's decision in *Jenkins* v. *United States*, 380 U.S. 445 (1965), which has been cited and relied upon as controlling precedent by petitioner herein. Accordingly, the *Thomas* decision adds further support to our contention that petitioner's conviction should and can be reversed upon established precedent on the basis of jury coercion, even without reaching the question of whether this Court in the exercise of its general supervisory powers should review this issue and resolve the conflict among federal and state appellate courts.

CONCLUSION

Therefore, for the reasons stated herein, and in the Petition and in the Reply previously filed, a Writ of Certiorari should be granted.

Respectfully submitted,

EARL W. KINTNER
BURTON A. SCHWALB
MICHAEL J. VALDER
AREENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006
Telephone: (202) 347-8500
Counsel for Petitioner

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